

IN THE
United States
Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

THE CITY OF ASTORIA, a Municipal corporation of the State of Oregon,

Plaintiff in Error,

vs.

AMERICAN LA FRANCE FIRE ENGINE COMPANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

A. W. NORBLAD,
 F. C. HESSE and
 J. T. JEFFRIES,

Attorneys for Plaintiff in Error.

FULTON & BOWERMAN,
 BERNSTEIN & COHEN,
 Attorneys for Defendant in Error.

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STATEMENT.

This is an action wherein the plaintiff seeks to recover against the defendant by reason of a contract entered into by and between it and the City of Astoria, for the cost price of a Six Cylinder Combination Pump Hose and Chemical Car to be used

as a part of the fire equipment in the Fire Department of the City of Astoria. The allegations of the complaint are as follows:

Plaintiff is a corporation with right to do business in the State of Oregon, and that the defendant is a municipal corporation duly chartered by the general laws of the State of Oregon; that the charter of said city provides among other things that the city council may establish and maintain a fire department; that pursuant to said authority, the said city council did, by ordinance duly set out by number and title, provide for the establishment and maintenance of a fire department in said city, and authorized a committee known as the Fire and Water Committee to manage and control that department; that the said fire and water committee reported to the city council the necessity of purchasing said apparatus consisting of a Six Cylinder Combination Pump Hose and Chemical Car for the use of the Fire Department; that the city council authorized said Committee to secure bids for same; that said committee secured bids and reported the same to the city council requesting authorization to purchase from the plaintiff herein said apparatus upon the terms as therein mentioned and to enter into a contract with the plaintiff herein to carry out said purposes; that the common council granted to said committee said authority; that thereafter pursuant to said authority a contract was entered into

by the plaintiff and by the City of Astoria signed on its behalf by all the members of the Fire and Water Committee; that said contract is set out in full in the complaint and among other things provides that the delivery of the apparatus shall be made on cars at Astoria, Oregon; that upon said contract being executed the plaintiff immediately commenced the construction of said apparatus at its factory in the State of New York and upon its completion shipped same to plaintiff addressed to the Fire and Water Committee of said City of Astoria, Oregon. That same was received by said Committee and tested; and that the committee thereupon reported to the city council that the apparatus met all the requirements of the contract and recommended the passage of an ordinance providing for the payment of same; that the report was received and upon motion same was adopted by the council; thereupon an ordinance was introduced providing for the payment of same, which ordinance was duly carried but was vetoed by the Mayor of the city and which veto was afterwards sustained; that upon the arrival of the fire apparatus in the city of Astoria same was tendered to defendant and delivered to it at its fire headquarters; that the plaintiff herein had performed all the provisions, and stipulations of contract on its part to be performed, but that the defendant refused to accept or pay for said apparatus, and that plaintiff presented its claim to the council for payment, which claim was rejected. This com-

plaint was challenged by demurrer, and after argument the demurrer was over-ruled and an opinion on the demurrer was filed herein by Wolverton, District Judge, which opinion is found in the Transcript of Record, pages 17, 18, 19, 20, 21. Thereafter the defendant answered said complaint, admitting all the allegations set forth in said complaint, and made certain denials in order to put in issue the validity of the contract. Thereupon plaintiff asked for judgment on the pleadings on the ground that the answer of defendant did not raise an issue of fact, which motion was duly heard by the court, the defendant admitting that the purpose of its denial was "designated and intended only to put in issue the validity of the contract set forth in the complaint," and the learned Judge after argument entered judgment in favor of plaintiff as prayed for in the complaint, which judgment is found on pages 25 and 26 in the Transcript of Record and to reverse which plaintiff in error has sued out a writ to this court.

ARGUMENT.

VALIDITY OF CONTRACT ONLY QUESTION IN ISSUE.

The first contention of defendant in error is that the contract is valid and binding upon the city because under the charter and ordinance passed by the City Council, another method is provided for the purchase of apparatus.

The defendant in error is in perfect accord with the principles as set forth in the brief of plaintiff in error, namely, "The Charter is a grant of power and the municipality possesses only the powers which its charters confer upon it, either expressly or as incidental to the execution of its powers," and further that a municipal corporation possesses and exercises the following powers and no others: "First, those granted in express words; second, those necessarily of fairly implied in and incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient but indispensable."

These are fundamental and need no citation of authorities to establish them.

The provisions of the charter which are found in section 38, grant to the City Council all powers to carry out the purposes of City government and among others is "to establish and maintain a fire de-

partment," and after enumerating the various powers and authority vested in the city council provides, that the power and authority given to the council by Section 38 "can only be exercised or enforced by ordinance, unless otherwise provided." In pursuance to this authority, the city council did by ordinance provide for the creating of a fire department in the city, and further provided that all the powers to be exercised in carrying on the fire department including the purchase of all supplies for the fire department should be exercised by and through a Fire and Water Committee. The Fire and Water Committee were named by the city council and were in the active control of the fire department and in the exercise of their duties as members of such Fire and Water Committee when the plaintiff herein had his dealings and made his contract with the city. The contract was finally entered into and signed by the parties in strict accordance with the method provided for in the ordinance. At all times this committee acted under the instructions of the city council, reported to it regularly and received from it its directions, and followed the methods pointed out. It is well settled that where the general method is pointed out by the charter and special powers conferred in the charter, that any action on the part of the city whereby it employed the special power would be valid and binding upon the city. This construction has been upheld by the Supreme Court of the State of Oregon and has the approval of Wolverson,

District Judge, who in the opinion filed herein on the demurrer uses this language:

"It is objected to the validity of the contract that its execution on the part of the city was not authorized in conformity with the requirements of section 124 of the Charter."

It is an analogous case in the Supreme Court of the State of Oregon, wherein it was sought to have applied to the identical provision in bar for a recovery on contract with the city, the court held that as the Charter had conferred special power upon the Common Council touching the subject matter of the contract the more general provisions was without obligation.

Beers vs. Dalles City, 16 Ore. 334; there it was said:

"The Council having full power over the subject may exercise it in any manner that may be most convenient."

reversed in La France Engine Co. v. City of Astoria 218 Fed 480.

This especially applies in this case where the contract for fire apparatus was within the object of the creation of the corporation. The same doctrine has been upheld by this court in City of Forsyth vs. Crellin, No. 210 Fed. 835, wherein the court through Wolverton, District Judge, uses the following language:

"Thus is provided a specific method by which the

city may not only secure the work to be done, but may obligate itself to compensate the contractors for doing the work," and further in this same case uses this language: "Upon the other hand, it would seem a contractor would be entitled to his pay in pursuance also of the stipulations in the contract. The method thus prescribed in entering into a contract of the kind is complete within itself, and it would seem that no other conditions were designed to be imposed, either upon the city or upon the contractor to entitle the latter to his compensation in accordance with the stipulations of the contract which the law specifically empowers and authorizes the parties to make."

THE CONTRACT IN THIS CASE WAS NEITHER GOVERNMENTAL OR LEGISLATIVE, BUT PROPRIETARY.

If by legislative power the plaintiff in error means the exercise of its governmental functions, we are in perfect accord with it on that subject, but we do not concur in the view that the execution of a contract for the purpose of furnishing fire apparatus for the fire department of a city is the exercise of a governmental power, but on the contrary is proprietary and for the purpose of the private advantage of all inhabitants of the municipality. An examination of the authorities cited in the Brief of Plaintiff in error on this subject will disclose the fact that in those cases where the contract was held invalid, the council failed to take the jurisdictional steps pro-

vided for in the charter. These jurisdictional matters are held to be mandatory and consequently in those cases where the council failed to follow the mandate of the charter the contracts could not be enforced.

A distinction is made between the exercise by a city of its powers; one of which is governmental and the other proprietary. The doctrine is well stated in the case of *First National Bank vs. Emmetsburg*, 157 Ia. 555, same case reported in L. R. A. 1915—At page 982 as follows:

“It seems to be correctly held generally that a city has two classes of powers, which have been stated as follows: “A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers, unimpaired. But in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it

in the same way, and in their exercise it is to be governed by the same rules, that govern a private individual or corporation." *Illinois Trust & Sav. Bank vs. Arkansas City*, 34 L. R. A. 518, 22 CCA 171, 40 U. S. App. 257, 76 Fed. 271, *Southern Bell Telephone & Teleg. Co. vs. Mobile* (C. C.) 162 Fed. 523; *Winona vs. Botzet*, 23 L. R. A. (N. S.) 204, 94 C. C. A. 563, 169 Fed. 322, 21 Am. Neg. Rep. 445.

The dual character of municipal corporations has already been distinctly recognized by this court, and we have in effect at least directly adopted the rule stated in the quotation from the *Illinois Sav. Bank* case. *State ex rel. White vs. Barker*, 116 Iowa, 96, 57 L. R. A. 244, 94 Am. St. Rep. 222, 89 N. W. 204, and cases there cited. But the last cited case does not stand alone among our decisions as a recognition of the rule."

The same doctrine is recognized in the *Oregon* case above cited and approved by Wolverton, District Judge, in his opinion filed herein. In that case upon petition for rehearing, Judge Strahan, in denying the petition, used the following language: "On the second point presented by the petition I think that the construction placed upon section 128 must be adhered to. Any other would render it exceedingly difficult and inconvenient to conduct the affairs of the city. The Common Council would be compelled to devote more of its time to the consid-

eration and passage of a great many useless ordinances of no practical utility on subjects where the business is now usually conducted under the direct supervision of the council or a committee thereof." In the case at bar, the City Council and the Fire and Water Committee were not enacting any laws for governmental purposes, but on the contrary, the contract was one of proprietary interest, and under the authority above cited and the contract made by a committee having the matter in charge within the general scope of the powers of the city government is held binding and valid against the city.

THE CITY IS ESTOPPED TO QUESTION THE VALIDITY OF THE CONTRACT.

The defendant in error also contends in this action that the city is estopped from questioning the validity of the contract and the acts of its committee under its direction and authority. In respect to the actions concerning which a city may be estopped there are also two classes of cases referred to by the authorities under the question of *ultra vires*.

Where the contract is of such a nature as comes within the purposes of the creation of the corporation and is expressly provided for in the charter, the corporation is bound by the same rules as govern private corporation. We cannot sanction the doctrine laid down in plaintiff's brief that under these circumstances this is not a question of "justice and good conscience," especially since the contract

does not violate any question of public policy and there is no prohibition against it, but maintain that the municipality is bound by the same rules as other corporations and should not be allowed to induce a party to expend money and perform his part of the contract and escape its liability. And in this respect, we prefer to agree with the opinion filed by Wolverton, District Judge herein, that "justice and good conscience" have material bearing on the matter.

In the case of *Bell vs. Kirkland*, 102 Minn. 213, reported in 120 Am. St. Rep. 621, the court elaborately reviews the question of ultra vires and the distinction between acts of a municipality which are beyond its power and those informally done but within its power, and we quote from this case as follows in 120 Am. St. Rep. pages 630-631.

"There is good authority to the effect that where the act of a corporation is done with power to do it, but without the formality prescribed for the execution of the power persons dealing with the company are not bound to do more than to ascertain that the power to do the proposed act exists: 5 Thompson on Corporations, 5978; 2 Morawetz on Private Corporations, Secs. 678-686. Allen J., in *Moore vs Mayor*, 73 N. Y. 238, 21 Am. Rep. 134, said: "Persons dealing with corporations in respect to a matter within the general scope of the powers of the city government need not go behind the doings of the common council, apparently regular, to inquire

after preliminary or extrinsic irregularities It is indispensable to any government, state or municipal, that full faith and credit be given to the acts of the governing body, and that individuals having occasion to deal with agents of the government should be permitted to regard the acts of the government valid in the absence of any apparent defect, either in the power or the manner of its exercise. If the act is not within the general powers of the municipality or its governing body, the case would be different, for everyone dealing with the agents of the municipality is bound to know the limits of that power. It is not allowable, however, for a municipal corporation to perpetrate a fraud upon those contracting with it upon the faith of its laws and ordinances, apparently valid and represented as such, by repudiating them upon the allegation of some technical and formal irregularity in their adoption, an omission of some collateral act, some formality prescribed by statute, not of the substance of the power or jurisdictional in its character." That leading case and this doctrine approved by this court in *Bradley vs. Village of West Duluth*, 45 Minn. 4, 47, N. W. 166. And see *Brownell vs Town of Greenwich*, 144 N. Y. 518, 22 N. E. 24, L. R. A. 685; *Ohio and N. R. R. Co. vs. McCarthy*, 96 U. S. 285, 24 L. Ed. 613, *Miners D. Co. vs. Zellerbach*, 37 Cal. 543. 99 Am. Dec. 300; *Green's Brice's Ultra Vires*, 37 and note, A. P. 506; 5 *Thompson on Corporations*, Sec. 5967."

In this case there can be no question as to the fact that not only had the city council full authority in its charter to provide for and maintain a fire department, but to appoint a committee in charge thereof, but that such a department was a necessary and proper one for the municipality to carry on and comes within the full scope of its purposes. And in the leading case of *Hitchcock vs. Galveston*, 96 U. S., page 341, the opinion was delivered by Mr. Justice Strong.

In that case, the city having the power to make contracts for the improvement of sidewalks ordered the contract to be entered into on behalf of the city by the Mayor and the Chairman of the Committee on Streets and Alleys, and it was contended that this contract was not valid and binding on the city, and in answer to this contention, Judge Strong says: "And if the City Council had lawful authority to construct the sidewalks, involved in it was the right of the Mayor and the Chairman of the Committee on Streets and Alleys to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition." In the same case on the doctrine of estoppel Judge Strong approves the rule laid down in *State Bd. of Agricul. vs. Citizens' St. R. Co.* 47, Ind. 407 in an action against a municipal corporation as follows: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it,

and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract."

In the case at bar as to the estoppel, it will be remembered that the city not only authorized the committee to enter into the contract, but called attention to the fact that it had money on hand from the levy of the prior year to pay for this engine, it not only stood by and allowed the plaintiff to have the engine manufactured in its factory in New York, but when it reached Astoria had it tested and found it answered all the requirements of the contract and specifications, so that on this branch of the case, both as to the power of the committee to enter into the contract and what was done under it we again call attention to the language of Wolverton, District Judge, in the opinion of the demurrer filed herein as follows:

"In the present case, the Fire Department was created by ordinance and the common council was proceeding in pursuance of its special authority to create a fire department and to provide engines and other apparatus therefor wherein it authorized the execution by the committee of the contract in question, and I am impressed in the light of the case of *Beers vs. Dalles City*, supra, that the contract is legal and binding upon the city and so hold.

In the complaint, it appears that in reliance upon the contract the plaintiff constructed the apparatus in New York and shipped it to Astoria, where it was duly tested by the Committee and found to be up to the requirements of the contract, so that in justice and good conscience the city ought to pay the stipulated purchase price."

If therefore, the contract is "legal and binding" and "the city in justice and good conscience ought to pay the stipulated purchase price," the judgment of the lower court should be sustained.

Respectfully submitted,

FULTON & BOWERMAN,
BERNSTEIN & COHEN,
Attorneys for Defendant in Error.